No. 14331

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

ARTHUR A. ARNHOLD, et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

SECOND PETITION FOR REHEARING

TO: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM T. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

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COME NOW ARTHUR A. ARNOLD et al, Appellants herein, and respectfully petition the Court for a rehearing en banc of the decision entered herein on September 1, 1955.

I.

The ground upon which this Petition is based is the supervening decision of the Supreme Court of the United States in *Indian Towing Co. v. United States,* No. 8, October Term, 1955 (as yet unreported—printed in full in the Appendix, *infra* p. 1A).

II.

That case modified the Dalehite case—the basis of the decision herein—and requires a re-examination of the instant case to avoid a conflict in currently applicable law.

III.

This action was brought against the United States under the Tort Claims Act, 28 USCA § 1346 (b), §§2670—2680, to recover damages for a fire (a) originating on government-owned land as a result of the negligence of forest service employees, (b) negligently permitted to spread to adjoining government and private land and (c) negligently allowed to escape some six weeks later from that area, causing damage to appellants.

IV.

The following are the principal conflicts between the opinion in the case at bar and the *Indian Towing* case:

1. Public Function and Public Capacity Theory

(a) This Court held that control of conflagrations on forest land is a public function and exempts the Government from liability. 225 F. (2d) at 645.[1]

The Supreme Court in the *Indian Towing* case rejected the public function theory, saying:

"The fact of the matter is that the theory

[1] Reference is made to the opinion of *Rayonier, Inc., v. U. S.*, companion case of the case at bar, for the reason that the case at bar, 225 F. (2d) 650, was decided "on authority of the *Rayonier* case * * *." The appellant in the *Rayonier* case has likewise petitioned for a second rehearing.

> whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts." (App. p. 4A-5A).

(b) This Court said "that the Government did no more than undertake to perform services in a public capacity," 225 F. (2d) at 646.

In the *Indian Towing* case the Supreme Court said:

> "While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 USC 2680, all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government." (App. p. 7A); and
>
> "On the other hand, it is hard to think of any Governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, and could not conceivably be, privately performed." (App. p. 7A).

2. Volunteer

This Court held that the Government "may not be said to assume the common law obligation of a volunteer." 225 F. (2d) at 646.

The Supreme Court in the *Indian Towing* case, in speaking of the language of the Tort Claims act, said:

> "It is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." (App. p. 4A).

That Court also said that while the Coast Guard need not undertake the lighthouse service, if it did undertake to operate it, it was obligated to use due care; and if it failed in its duty and damage was caused thereby, the United States was liable under the Tort Claims Act. (App. p. 4A).

3. Fire Fighting

(a) This Court quoted with approval the following language from the *Dalehite* case:

> "* * * If anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." 225 F. (2d) 645.

The Supreme Court in the *Indian Towing* case gave a hypothetical example of consecutive negligent acts which, among others, included producing a spark which set a fire and sank a barge, and indicated that the Government would be liable under the Tort Claims Act. (App. p. 5A-6A).

In the *Indian Towing* case the Supreme Court, in referring to the *Dalehite* case, said:

> "The differences between this case and *Dalehite* need not be labored. The governing facts in *Dalehite* sufficiently emerge from the opinion in that case." (App. p. 9A).

The majority opinion contained a footnote, moreover, which stated:

> "The Court in *Dalehite* disposed of a claim of liability for negligence in connection with fire fighting by finding 'there is no analogous

liability * * * in the law of the torts. 346 U. S. at 44. But see *Workman v. New York City,* 179 U. S. 552." (App. p. 9A, N. 4).

The *Workman* case cited in the footnote held the City of New York liable for damages caused by a fireboat on its way to a fire.

The dissenting opinion in the *Indian Towing* case recognized the import of the majority opinion insofar as it would affect fire fighting, by saying:

> "The overall impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of 'any governmental activity on the operational level.' It seems broad enough to cover all so-called 'uniquely governmental activities.' Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled."[9]

(b) The Court in the case at bar quoted with approval the following language from the *Dalehite* case:

> "That cities, by maintaining fire fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched." 225 F. (2d) at 645

The Supreme Court in the *Indian Towing* case held that to read the Tort Claims Act,

> "as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private concern, * * * would thus push the courts into the 'governmental' —'non-governmental' quagmire that has long

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[9] But see footnote (3) of the majority opinion in which *Workman v. New York City* is cited. (App. p. 16A)."

plagued the law of municipal corporations." (App. p. 4A).

(c) This Court quoted with approval the following language from the *Dalehite* case:

> "It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights." 225 F. (2d) at 645.

The Supreme Court in the *Indian Towing* case listed the statutory exceptions to the Tort Claims Act and then said:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not leave just treatment to the caprice and legislative burden of individual private laws." (App. p. 8A).

4. Analogous Liability

This Court quoted with approval:

> "The Act did not create new causes of action where none existed before. * * * *Feres v. United States,* 340 U. S. 135 * * *" 225 F. (2d) at 645.

The Supreme Court in the *Indian Towing* case said:

> "*Feres* held only that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident service'. * * * ." (App. p. 9A).
>
> and
>
> "* * * This Court would be attributing bizarre

motives to Congress to assert that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." (App. p. 6A).

V.

In summarily dismissing the *Dalehite* case on the basis of its facts, limiting the *Feres* case, and citing the *Workman* case with approval, the Supreme Court clearly indicated that the doctrine of the *Feres* and *Dalehite* cases should not be extended to other cases. On December 5, 1955, the Supreme Court affirmed per curiam *Eastern Air Lines v. Union Trust Company,* 221 F. (2d) 62, on the authority of the *Indian Towing* case. The decision rejected the argument that *Dalehite* excluded liability for "governmental functions of a regulatory nature" of CAB airport control tower employees. (221 F. (2d) at p. 73).

Here a portion of the 1600 acre area that smoldered for six weeks was government-owned, and the Government's fire fighting equipment and facilities were alleged to be no different than that of other adjacent owners. (R. 9-10, Par. XIII) Other distinguishing facts are that in *Dalehite* there was a substantial question whether or not the Coast Guard ever actually undertook to fight the fire or had notice of it,[2] and even if it did so, it was fighting a fire aboard a French ship in cargo belonging to private individuals.

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[2] "State and municipal authorities took and retained charge of fire-fighting and disaster-control measures at the time of the disaster." Brief for the United States, p. 170, n. 8 *Dalehite v. United States.*

"The *Grandcamp* exploded about an hour after the fire was noticed." *Dalehite v. United States,* 346 U. S. 15, p. 23, n. 7.

VI.

For many years prior to passage of the Federal Tort Claims Act, Congress in every session passed numerous bills compensating government employees and citizens for property destroyed by fire.

Such bills included awards of damages to adjoining timber owners as a result of a forest fire originnating on a Government migratory game refuge,[3] conferred jurisdiction upon a district court to hear claims of numerous occupants of a building for damages from a fire allegedly started from an oil stove in part of the building occupied by the W.P.A.,[4] damages arising out of fires in National Forests and National Parks,[5] fire damages arising out of negligence in clearing banks of a stream,[6] and the destruction by fire of a barn caused by W.P.A. workers burning brush on a nearby road.[7]

VII.

It has become apparent that the Supreme Court in the *Indian Towing* case has promptly realized the confusion caused by the *Dalehite* decision and has restated the principles which determine the liability of the Government for torts. While the *Dalehite* case was not expressly overruled, it is apparent

[3] 49 Stat. 2194 C. 787 August 27, 1955 (conferring jurisdiction on District Court); 54 Stat. 1351 C. 680 August 13, 1940 (acknowledging District Court decision of $33,138.00 liability); 61 Stat. 974 C. 137 June 25, 1947 (authorizing payments of sums to other claimants "as a result of the forest fire or fires.")

[4] 55 Stat. 958 C. 442 October 14, 1941.

[5] 62 Stat. 1417 C. 796 July 1, 1948; 58 Stat. 999 C 313 June 28, 1944; 57 Stat. 651 C. 34 April 8, 1943; 56 Stat. 1216 C. 665 December 2, 1942.

[6] 55 Stat. 944 C. 324 July 24, 1941.

[7] 55 Stat. 905 C. 109 May 12, 1941.

that it no longer is authority for many of the legal concepts it enunciates.

VIII.

Both the District Court and this Court dismissed the case at bar on the authority of the *Dalehite* and *Feres* cases. The Supreme Court has now reversed its holding in the *Dalehite* case that the Coast Guard cannot be held liable for nonfeasance. This Court should re-examine the issues in the case at bar in the light of the *Indian Towing* opinion. Failure to grant appellants a rehearing will preclude them from their day in court.

APPELLANTS PRAY that their Second Petition for Rehearing be granted.

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CERTIFICATE

DONALD McL. DAVIDSON, one of the counsel for appellants herein, hereby certifies that in his judgment the foregoing motion for leave to file a Second Petition for Rehearing and the foregoing Second Petition for Rehearing are well founded and that they are not interposed for delay.

DONALD McL. DAVIDSON

Appendix

SUPREME COURT OF THE UNITED STATES

No. 8—October Term, 1955.

Indian Towing Company, Inc., et al., Petitioners, *v.* United States of America.	On Writ of Certoriari to the United States Court of Appeals for the Fifth Circuit.

[November 21, 1955.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioners brought suit in the United States District Court for the Southern District of Mississippi, seeking recovery under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse light. They alleged that on October 1, 1951, the tug Navajo, owned by petitioner Indian Towing Company, was towing Barge AS-16, chartered by petitioner Upper Mississippi Towing Corporation; that the barge was loaded with a cargo of triple super phosphate, consigned to petitioner Minnesota Farm Bureau Service Company and insured by petitioner United Firemen's Insurance Company; that the tug Navajo went aground on Chandeleur Island and as a result thereof sea water wetted and damaged the cargo to the extent of $62,659.70; that the consignee refused to accept the cargo; that petitioners Indian Towing Company and Upper Mississippi Towing Corporation therefore became responsible for the loss of the cargo; and that the loss was paid by petitioner United Firemen's Insurance Company under loan receipts. The complaint further stated that the grounding of the Navajo was due solely to the failure of the light on Chandeleur Island which in turn was caused by the negligence of the Coast Guard. The specific acts of negligence [1] relied on

were the failure of the responsible Coast Guard personnel to check the battery and sun relay system which operated the light; the failure of the Chief Petty Officer who checked the lighthouse on September 7, 1951, to make a proper examination of the connections which were "out in the weather"; the failure to check the light between September 7 and October 1, 1951; and the failure to repair the light or give warning that the light was not operating. Petitioners also alleged that there was a loose connection which could have been discovered upon proper inspection.

On motion of the respondent the case was transferred to the United States District Court for the Eastern District of Louisiana, New Orleans Division. Respondent then moved to dismiss on the ground that it had not consented to be sued "in the manner in which this suit is brought" in that petitioners' only relief was under the Suits in Admiralty Act, 41 Stat. 525, or the Public Vessels Act, 43 Stat. 1112. This motion was granted and the Court of Appeals for the Fifth Circuit affirmed *per curiam*. 211 F. 2d 886. Because the case presented an important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act, we granted certiorari, 348 U. S. 810. The judgment of the Court of Appeals was affirmed by an equally divided Court, 349 U. S. 902, but a petition for rehearing was granted, the earlier judgment in this Court vacated, and the case restored to the docket for reargument before the full Bench. 349 U. S. 926.

The relevant provisions of the Federal Tort Claims Act are 28 U. S. C. §§ 1346 (b), 2674, and 2680 (a):

> § 1346 (b). ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ac-

cruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any em [2] ployee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2674. "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

. . . . .

§ 2680. "The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The question is one of liability for negligence at what this Court has characterized the "operational level" of governmental activity. *Dalehite v. United States*, 346 U. S. 15, 42. The Government concedes that the exception of § 2680 relieving from liability for negligent "exercise of judgment" (which is the way the Government paraphrases a "discretionary function" in § 2680 (a)) is not in-

volved here, and it does not deny that the Federal Tort Claims Act does provide for liability in some situations on the "operational level" of its activity. But the Government contends that the language of § 2674 (and the implications of § 2680) imposing liability "in the same [3] manner and to the same extent as a private individual under like circumstances . . . ." must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of "uniquely governmental functions." The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.

Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "governmental"—"non-governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by cov-

erly embedding the casuistries of municipal liability for torts.[1] [4]

While the Government disavows a blanket exemption from liability for all official conduct furthering the "uniquely governmental" activity in any way, it does claim that there can be no recovery based on the negligent performance of the activity itself, the so-called "end-objective" of the particular governmental activity. Let us suppose that the Chief Petty Officer going to inspect the light on Chandeleur Island first negligently ran over a pedestrian in a Coast Guard car; later, while he was inspecting the light, he negligently tripped over a wire and injured someone else; he then forgot to inspect an outside connection and that night the patently defective connection broke and the light failed, causing a ship to go aground and its cargo of triple super phosphate to get wet; finally the Chief Petty Officer on his way out of the lighthouse touched a key to an uninsulated wire to see

[1] A good illustration of the effort of a conscientious court to reconcile the irreconcilable is *Haley v. City of Boston*, 191 Mass. 291, 77 N. E. 888. For an example of the confusion prevailing in one jurisdiction, compare *District of Columbia v. Woodbury*, 136 U. S. 450 (municipal corporation liable for injuries caused by negligent failure to keep sidewalk in repair) with *Harris v. District of Columbia*, 256 U. S. 650 (municipal corporation not liable for injuries caused by negligent sprinkling of streets). But even in the law of municipal corporation and state liability, one State at least has sought to emerge from the quagmire. See the more recent New York cases: *Foley v. State of New York*, 294 N. Y. 275, 62 N. E. 2d 69 (State liable when negligent failure to replaced burned-out bulb in traffic light caused accident); *Bernardine v. City of New York*, 294 N. Y. 361, 62 N. E. 2d 604 (city liable in negligence action for damages caused by runaway police horse). When the confused law of municipal corporations is applied to the Tort Claims Act, the same type of results occur. Compare the holding of the Court of Appeals for the Fifth Circuit in the instant case, 211 F. 2d 886, with its holding in *United States v. Lawter*, 219 F. 2d 559 (United States liable under Tort Claims Act for negligence of Coast Guard during helicopter rescue operation).

tions, see § 2680 (a)-(m).[3] For administrative safeguards, see § 2401 (b) (statute of limitations); § 2402 (denial of trial by jury; § 2672 (administrative adjustment of claims of $1,000 or less); § 2673 (reports to Congress); § 2674 (no liability for punitive damages or for interest prior to judgment); § 2675 (disposition by [7] federal agency as prerequisite to suit when claim is filed); § 2677 (compromise); § 2679 (exclusiveness of remedy).) The language of the statute does not support the Government's argument. Loose general statements in the legislative history to which the Government points seem directed mainly toward the "discretionary function" exemption of § 2680 and are not persuasive. The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then

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[3] Congress significantly withheld liability for claims relating, *inter alia*, to the postal service, tax collection, quarantine establishment, fiscal operations, combatant activities of the Coast Guard during time of war, and the activities of the TVA.

the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

The Court of Appeals for the Fifth Circuit considered *Feres v. United States*, 340 U. S. 135, and *Dalehite v. United States*, 346 U. S. 15, controlling. Neither case is applicable. *Feres* held only that "the Government is not liable under the Federal Tort Claims Act for injuries to servicement when the injuries arise out of or are in [8] the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U. S., at 146. And see *Brooks v. United States*, 337 U. S. 49. The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case.[4]

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings.

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[4]The Court in *Dalehite* disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability . . . ." in the law of torts. 346 U. S., at 44. But see *Workman v. New York City*, 179 U. S. 552.

SUPREME COURT OF THE UNITED STATES

No. 8—October Term, 1955.

Indian Towing Company, Inc., et al., Petitioners, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 21, 1955.]

Mr. Justice Reed, with whom Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Minton join, dissenting.

The Court reverses the judgement on the ground that the United States is liable under the Federal Tort Claims Act for damages caused by the negligence of the Coast Guard in maintaining a lighthouse light near the mouth of the Mississippi. The alleged negligence was the failure of the Coast Guard personnel to check the electrical system which operated the light, the failure to make a proper examination of the connections and other apparatus connected with the light, and the failure to repair the light or give notice to vessels that the light was not functioning. Although navigators were warned this was an "unwatched light,"[1] it is assumed at this point in the litigation that this negligence occurred and that it was the proximate cause of the loss. Government operation of the lighthouse was authorized by 14 U. S. C. § 81. It is forbidden to others except by authority of the Coast Guard.[2] [1]

[1] United States Coast Guard. Light List, *Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), pp. 5, 498.

[2] 14 U. S. C. § 83:

"No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from

The question of the liability of the United States for this negligence depends on the scope and meaning of the Federal Tort Claims Act. The history of the adoption of that Act has heretofore been thoroughly explained.[3] Before its enactment, the immunity of the Government from such tort actions was absolute. The Act authorized suits against the Government under certain conditions. [2]

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the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined not more than $100 for each offense. Each day during which such violation continues shall be considered as a new offense."

The Government advises that as of June 30, 1953, government aids to navigation numbered 38,169; authorized private aids 3,301. Aids to Navigation Operated and Maintained by the United States and Coast Guard (June 30, 1953) pp. 1, 12.

We are further advised:

"The Coast Guard in its manual on aids to navigation gives these examuples of typical aids considered in the category of private aids [U. S. Coast Guard, *Aids to Navigation* (C. G. 127. 1945) p. 1201]:

"(1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.

"(2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which channels are used exclusively by the corporation's, or contractor's, vessels.

"(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

"See also, U. S. Coast Guard. *Aids to Navigation Manual* (CG-222, Jan. 1953), pp. 4–1, 4–3.

"Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C. F. R. (1949 ed.) § 68.01–1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U. S. C. 409; 33 C. F. R. (1949 ed.) 64.01-1."

[3] *Feres v. United States*, 340 U. S. 135; *Dalehite v. United States*, 346 U. S. 15.

The Government was made liable for injury to persons or property.

> "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b).

There was a further condition, 28 U. S. C. § 2674, that the United States should be liable "in the same manner and to the same extent as a private individual under like circumstances."[4]

In *Feres* v. *United States*, 340 U. S. 135, we passed upon the applicability of the Act to claims by members of the armed services injured through the negligence of other military personnel.[5] We said:

> "One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of com-

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[4] There were further limitations and certain specific exceptions not pertinent here.

[5] *E. g.*, the negligence of an army surgeon during an operation in sewing up a towel in the abdomen of a soldier; and negligence in quartering a soldier in barracks known to be unsafe because of a defective heating plant.

[3] mand. . . . In the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Id.*, at 142.

Thus, in *Feres* the Court was of the view that the Act does not create new causes of action theretofore beyond the applicable law of torts. So, in determining whether an action for negligence in maintaining public lights is permissible, we must consider whether similar actions were allowed by the law of the place where the negligence occurred, prior to the Tort Claims Act, against public bodies otherwise subject to suit.

Dalehite v. *United States*, 346 U. S. 14, 42, followed the reasoning of *Feres*. That case involved, among other issues, the liability of the United States for negligence of the Coast Guard in fighting fire. The Coast Guard had been found negligent in its fire-fighting duties by the trial court. These duties were outside the discretionary function exception of § 2680 (a) of the Act. Resting our decision on the Act itself, we said the Tort Act

"did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was

there stated, limited United States liability to 'the [4] same manner and to the same extent as a private individual under like circumstances.' 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." *Id.*, at 43-44.

These two interpretive decisions have not caused Congress to amend the Federal Tort Claims Act. As a matter of fact the catastrophe that gave rise to the *Dalehite* case was subsequently presented to Congress for legislative relief by way of compensation for the losses which resulted, as found by the trial court, partly from the negligence of the Coast Guard. Throughout the reports discussion and enactment of the relief act, there was no effort to modify the Tort Act so as to change the law, in any respect, as interpreted by this Court in *Feres* and *Dalehite*.[6] Although its discussion was restricted solely to the discretionary function exception to the Act, Congress must have accepted the rulings relating to the issues here involved as in accord with its understanding of the Tort Act. One cannot say that when a statute is interpreted by this Court we must follow that interpretation in subsequent cases unless Congree has amended the statute. On this our cases conflict.[7] However, we should continue to hold, as a matter of *stare decisis* and as the normal rule, that in-

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[6] Pub. Law No. 378, 84th Cong., 1st Sess.; H. R. Rep. No. 2024, 83d Cong., 2d Sess.; S. Rep. No. 2363, 83d Cong., 2d Sess.; H. R. Rep. No. 1305, 84th Cong., 1st Sess.; H. R. Rep. No. 1623, 84th Cong., 1st Sess.; S. Rep. No. 684, 84th Cong., 1st Sess.

[7] Compare *United States v. Elgin R. Co.*, 299 U. S. 492, 500; *United States v. South Buffalo R. Co.*, 333 U. S. 771, 775; *Toolson v. New York Yankees*, 346 U. S. 356, with *Helvering v. Hallock*, 309 U. S. 106; *Commissioner v. Church*, 335 U. S. 632.

action of Congress, after a well-known and important decision of common knowledge, is [5] "an aid in statutory construction . . . useful at times in resolving statutory ambiguities." *Helvering* v. *Reynolds*, 313 U. S. 428, 432. The non-action of Congress should decide this controversy in the light of the previous rulings. The reasons which led to the conclusions against creating new and novel liabilities in the *Feres* and *Dalehite* cases retain their persuasiveness.

This enactment, like any other, should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress. It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain. The courts are not the legislative branch of the Government.

The Act made the Government liable in instances where it would be suable "if a private person." The meaning of "private person" is not discussed in the legislative history. In *Feres* we talked of private liability and came to a conclusion which is contrary to that reached by the Court today. See pp. 3—4, *supra*. We held that because surgeons in private practice or private landlords were liable for negligence did not mean the United States was. Liability of governments for the failure of lighthouse warning lights is as unknown to tort law as, for example, liability for negligence in fire fighting excluded by the *Dalehite* ruling. Lighthouse keeping is as uniquely a governmental function as fire fighting. There is at least some uncertainty and ambiguity as to what Congress meant by making the United States liable in circumstances

where it would be liable "if a private person." That uncertainty should not lead us to accept liability for the United States in this case. In dealing with this [6] enlarged concept of federal liability for torts, wisdom should dictate a cautious approach along the lines of *Feres* and *Dalehite.*

The Act says that the United States shall be liable in accordance with the law of the place where the act or omission occurred. § 1346 (b). This alleged tort occurred in Louisiana. Under the Louisiana law a municipal corporation is not responsible for injury sustained as a result of negligence on the part of the employees of a city in the maintenance of traffic lights.[8] Street traffic lights are a close analogy to navigation lights. We can see no reason to doubt that under Louisiana law the maintenance of navigation lights if permissible by municipalities would likewise be free of liability. The Court warns us against the morass of decisions that involve municipal tort liability. It calls that law a "quagmire" and avoids it by a complete surrender of sovereign immunity without regard to the law of municipal liability of the respective States.

The overall impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of "any governmental activity on the 'operational level.' " It seems broad enough to cover all so-called "uniquely governmental activities." Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled.[9] Per-

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[8] *Edwards v. City of Shreveport*, 66 So. 2d 373; cf. *Howard v. City of New Orleans*, 159 La. 443, 105 So. 443.

[9] But see footnote 3 of the majority opinion in which *Workman v. New York City* is cited.

haps liability arises even for injuries from negligence in pursuing criminals.

The Court's literal interpretation of this Act brings about an application of the Federal Tort Claims Act analogous to that condemned by Congress in the Portal [7] to Portal Act of 1947 after *Andersen* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, see 61 Stat. 84, § 1 (a), and in the Fair Labor Standards Amendments of 1949, 63 Stat. 910, after *Bay Ridge Co.* v. *Aaron*, 334 U. S. 446, see 2 U. S. Code Cong. Serv. (1949) 1617. Compare *United States* v. *American Trucking Assn's*, 310 U. S. 534. The judgment should be affirmed.